

DISCLOSURES IN RESIDENTIAL MORTGAGE TRANSACTIONS – TILA, ECOA, FCRA, HMDA AND GLBA

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Jonathan D. Jaffe, Esquire
Kirkpatrick & Lockhart Nicholson Graham LLP
Four Embarcadero Center, Tenth Floor
San Francisco, CA 94111
Phone: 415.249.1023
Email: jjaffe@klng.com
Website: www.klng.com

Federal Laws Impacting the Industry



- Truth-in-Lending Act ("TILA") and Regulation Z
- Real Estate Settlement Procedures Act ("RESPA") and Regulation X
- Equal Credit Opportunity Act ("ECOA") and Regulation B
- Home Mortgage Disclosure Act ("HMDA") and Regulation C
- Fair Credit Reporting Act ("FCRA")
- Gramm-Leach-Bliley Act ("GLBA")
- FFIEC nontraditional mortgage product Guidance

And these are just SOME of the FEDERAL origination statutes!!



Why Should An IT Person Care Whether Captured Information Is An Application?



- Triggers disclosure requirements.
- Disclosure requirements trigger need to
 - » capture information needed to prepare the disclosures, and
 - » if disclosures are to be delivered electronically, develop mechanisms to obtain the consumer's consent and deliver the disclosures.
- Even online marketing materials can trigger disclosure requirements
- Also triggers certain federal and state reporting requirements

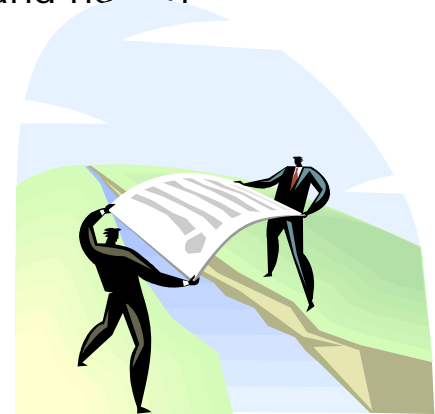


What Is An Application?



Depends on the statute

- TILA
 - » Adopts RESPA's definition: The submission of a borrower's financial information in anticipation of a credit decision, whether written or computer generated.
 - » No specific property identified = a prequalification and not an application.



What Is An Application?

CONTINUED



- ECOA
 - » ECOA: An oral or written request for an extension of credit that is made in accordance with procedures established by a creditor for the type of credit requested.
 - » However, if a creditor's policy is to require all applications to be in writing on the creditor's application form, but the creditor also makes credit decisions based on oral requests, the creditor will be deemed to have established procedures that it will accept both oral and written applications.



When Is An Initial TILA Notice Required And Who Must Give It?



CONTINUED



- What:
 - » For all closed end loans, an initial TILA disclosure.
- When:
 - » Before loan consummation or not later than three business days after the creditor receives the consumer's written application, whichever is earlier.
- What:
 - » In connection with variable rate mortgage loans, the booklet entitled Consumer Handbook on Adjustable Rate Mortgages and a program-specific written description for each program in which the consumer expresses an interest.
- When:
 - » At the time an application form is provided or before the consumer pays a nonrefundable fee, whichever is earlier.



When Is An Initial TILA Notice Required And Who Must Give It?

CONTINUED



- Who:
 - » “Creditor,” i.e., the person to whom the obligation is initially made payable.



When Is ECOA Collection Requirement Triggered And Who Must Collect?



- What:
 - Creditors must collect government monitoring information in connection with an application loan to be secured by owner occupied property.
- Who:
 - Applies to “creditors.” “Creditor” is defined as a “person who, in the ordinary course of business, regularly participates in the decision of whether or not to extend credit.”



When Is An ECOA Adverse Action Notice Required And Who Must Give It?



- What:
 - » A notice of action the creditor takes in connection with an application (e.g., approval of, counteroffer to, or denial of application for credit).
- When:
 - » If a creditor takes an action on a completed application.
 - A creditor has received a “completed application” once the creditor has obtained “all the information that it normally considers in making a credit decision...”
 - Thus, the lender is permitted to define what constitutes a completed application for ECOA purposes.



When Is An ECOA Adverse Action Notice Required And Who Must Give It?



CONTINUED



- When: (continued)
 - BUT, if when responding to a mere inquiry the creditor also evaluates information about the applicant, decides to decline the request, and communicates this to the applicant, the creditor has treated the inquiry as an application and must then comply with the adverse action notice requirements. In short, if a creditor reaches a credit decision and communicates that to the consumer, it will not matter that the creditor did not receive an application. The creditor must deliver the adverse action notice.



When Is An ECOA Adverse Action Notice Required And Who Must Give It?



CONTINUED



- Who:
 - » Again, applies to “creditors.”
 - » However, for adverse action notice purposes, also potentially applies to those who participate in the credit decision.
 - » Arrangers of credit are subject to only limited provisions of ECOA, and as a rule should not be subject to ECOA’s adverse action notice requirements.



When Is An ECOA Adverse Action Notice Required And Who Must Give It?



CONTINUED



- Who: (continued)
 - When an application is made “on behalf of an applicant” to more than one creditor, and one of the creditors offers credit that the applicant uses or expressly accepts, there is no notification requirement imposed.
 - But if no creditor offers credit, or if the applicant does not use or expressly accept any credit offered, each creditor must give notice of adverse action.
 - Any notice from a third party must include the identity of each creditor on whose behalf the third party is giving the notice.



When Is An ECOA Adverse Action Notice Required And Who Must Give It?



CONTINUED



- Who: (continued)
 - » If a third party is used to provide the notice, the creditors are protected from liability arising from the third party's acts or omissions only if the creditors gave accurate information to the third party and maintained reasonable procedures to ensure that the third party complied with the notice requirement.



What Are Inquiries, Prequalifications And Preapprovals For TILA Purposes?



- Remember, if a submission does not state or identify a specific property, the submission is an application for a prequalification and not an application for a federally related mortgage loan.



What Are Inquiries, Prequalifications And Preapprovals For ECOA Purposes?



- A creditor has a great deal of discretion in defining what constitutes an application.
- No application if a consumer calls to ask about loan terms and the creditor explains the basic terms, such as interest rates, loan-to-value ratios, and debt-to-income ratios.
- No application if the creditor explains its basic or general lending policies without telling the consumer whether she qualifies.



What Are Inquiries, Prequalifications And Preapprovals For ECOA Purposes?



CONTINUED



- If, however, a creditor also evaluates information about the applicant, decides to decline the request, and communicates this to the applicant, the creditor has treated the inquiry as an application and must then comply with the adverse action notice requirements.
- Prequalifications and preapprovals are not defined. Whether a prequalification or a preapproval rises to the level of an adverse action depends on the creditor's response to the request.



What Are Inquiries, Prequalifications And Preapprovals For ECOA Purposes?



CONTINUED



- An inquiry occurs if the creditor provides general information such as loan terms and the maximum amount a consumer could borrow under various loan programs, explaining the process the consumer must follow to submit a mortgage application and the information the creditor will analyze in reaching a credit decision.
- An application is subject to the adverse action notice requirements if, after evaluating information, the creditor decides that it will not approve the request and communicates that decision to the consumer.



When Is A FCRA Credit Score Notice Required And Who Must Give It?



- What:
 - Information relating to a credit score used in connection with an application for a residential mortgage loan.
- When:
 - As soon as reasonably practicable.
- Who:
 - All lenders who use a consumer credit score in connection with the application.



When Is A FCRA Risk-Based Pricing Notice Required And Who Must Give It?



- What:
 - Notice of (a) terms of credit based on consumer report, (b) identity of CRA, (c) consumer may obtain copy of report for free, (d) contact info for CRA.
- When:
 - Application of approval (subject to regulations not yet issued in final version), but only if person provides credit on material terms that are materially less favorable than the most favorable terms available to a substantial portion of consumers based on information in a consumer report.
- Who:
 - All lenders who use a consumer credit score in connection with the application.



When Is A FCRA Affiliate Sharing Notice Required And Who Must Give It?



- What:
 - Opt out notice for sharing of certain information with affiliates (may be combined with GLBA).
- When:
 - At least 30 days prior to sharing information.
- Who:
 - All lenders and their affiliates that share information with affiliates.



Gramm-Leach-Bliley Act - Scope and Applicability



GLB and Privacy Regulations apply to:

- “financial institutions”
 - Any institution the business of which is engaging in activities that are financial in nature or incidental to such activities.
- “nonpublic personal information”
 - Very broadly defined: includes virtually any personally identifiable information obtained by a financial institution in connection with providing a financial product or service to a consumer.
 - Includes lists of a financial institution’s consumers that is derived from information that is not publicly available.



Gramm-Leach-Bliley Act - Notice Requirements



- Initial Privacy Notice: Financial institutions must provide an initial privacy notice to:
 - Each consumer (i.e., any individual who obtains or has obtained a financial product or service from a financial institution) before disclosing any nonpublic personal information about the consumer to any nonaffiliated third party (unless an exception applies).
 - Each **customer** (i.e., any consumer who has a continuing relationship with a financial institution) not later than when the institution establishes the customer relationship.



Gramm-Leach-Bliley Act - Notice Requirements



CONTINUED



- Annual Privacy Notice:
 - Financial institutions must provide annual privacy notices to their customers not less than once every 12 months “during the continuation of the customer relationship”.
- Content of Initial and Annual Notices:
 - Notices must be “clear and conspicuous” and “accurately reflect” the institution’s privacy policies and practices.
 - Regulations spell out required content
 - Regulations contain compliance clauses and sample language.



Gramm-Leach-Bliley Act - Notice Requirements



CONTINUED



- Other:
 - Notices to joint consumers
 - Short form notices for consumers who are not customers
 - Simplified disclosures
 - Disclosure of anticipated policies and practices
 - Revised privacy notices
 - Delivery requirements



Gramm-Leach-Bliley Act – Security Requirements



CONTINUED



- Privacy is only the start – you must have sufficient security in place to permit access to only those who need access
- The FTC has started focusing on this, and has brought actions against mortgage companies whose security is deficient



When Is HMDA Data Collection Required And Who Must Collect It?



- When:
 - To report properly, must be collected at application.
- What:
 - Application or Loan Number, Date Application Received, Loan Type, Property Type, Purpose of Loan, Owner-Occupancy, Loan Amount, Preapproval (home purchase only), Action Taken, Date Action Taken, MSA/MD #, State Code, County Code, Census Tract, Applicant Ethnicity, Applicant Race, Applicant Sex, Applicant Income (gross - in thousands), Type of Purchaser, Reason for Denial (optional), Rate Spread, HOEPA Status (only for loans originated or purchased), Lien Status (only for applications and originations).



When Is HMDA Data Collection Required And Who Must Collect It?



CONTINUED



- Who:
 - Lenders that meet certain tests in terms of size, originations and/or location of offices. Effectively covers almost all institutional lenders.





- The FFIEC issued “Interagency Guidance on Nontraditional Mortgage Product Risks
- Applicable only to depository institutions and some affiliates
- Among other things, the Guidance suggests disclosures in addition to those required under TILA, and suggests delivering them in at or earlier than application
- Also suggests addressing issues in marketing materials



How Do These Rules Apply In An Internet Setting? - Calculators



Calculators.

- The use of plain calculator tools on an Internet site should not result in the need for disclosures under RESPA, TILA or ECOA.
 - » Site operator should include a disclaimer that:
 - The calculator is simply a tool to show how the interaction of various factors can impact the amount, type and terms of credit that may be available.



How Do These Rules Apply In An Internet Setting? - Calculators

CONTINUED



- Results of the calculator computations are not intended as the operator's decisions concerning the type or terms of credit for which the consumer may qualify.
- The consumer should submit an application if he or she is interested in determining more precisely the types and terms of credit for which she may qualify.



How Do These Rules Apply In An Internet Setting? - TILA

CONTINUED



- TILA Disclosures.
 - » Prequalifications.
 - Avoid the need for TILA disclosures by simply not requesting the address of the security property, and not providing a place for the consumer to input that address.
 - May send hard copy or send electronically using the E-sign or UETA statutes (as supplemented by the FRB's interim rules once compliance becomes mandatory).

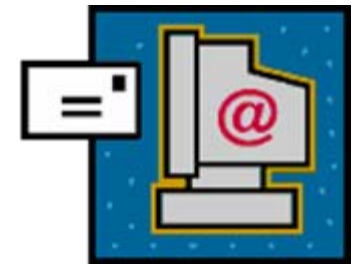


How Do These Rules Apply In An Internet Setting? - TILA

CONTINUED



- Delivery.
 - » May send hard copy or send electronically using the E-sign or UETA statutes (as supplemented by the FRB's interim rules once compliance becomes mandatory).



How Do These Rules Apply In An Internet Setting? – RESPA



CONTINUED



- RESPA Disclosures.
 - » Prequalifications. The same rule as applies to TILA.
 - » Delivery. Paper delivery or may use E-sign/UETA.

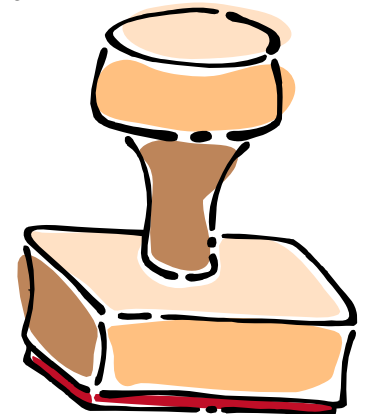


How Do These Rules Apply In An Internet Setting? – ECOA

CONTINUED



- ECOA Disclosures.
 - » Prequalifications and Preapprovals.
 - Attempt to avoid reaching a credit decision by not permitting the consumer to request a specific loan amount, type of credit, or specific credit terms.
 - If the site operator obtains information that shows consumer would not qualify for any credit (e.g., the consumer is currently in bankruptcy or has no income), it may be impossible to avoid an adverse action.

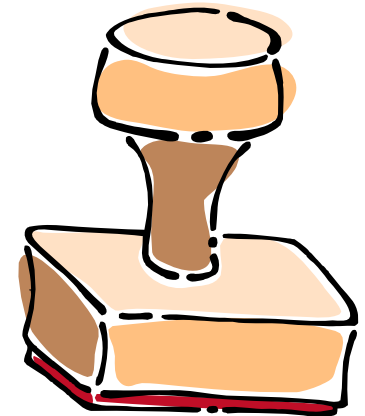


How Do These Rules Apply In An Internet Setting? - ECOA

CONTINUED



- If the site operator permits the consumer to request a certain loan amount or interest rate, and based on consumer's credit score or other information, consumer will not qualify for the loan amount or interest rate, it may be argued that an adverse action has been taken, in which case a notice should be delivered.

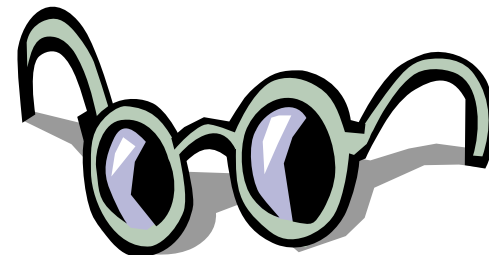


How Do These Rules Apply In An Internet Setting? - ECOA

CONTINUED



- Use of Filters.
 - Filters are used to prequalify a consumer for loans.
 - If it is determined that a consumer cannot qualify for any loan offered by a lender, it may be argued that the lender has reached an adverse credit decision and should deliver an adverse action notice. But the lender may be blind to the filtering process and have no knowledge that the consumer's information was passed through the filter.



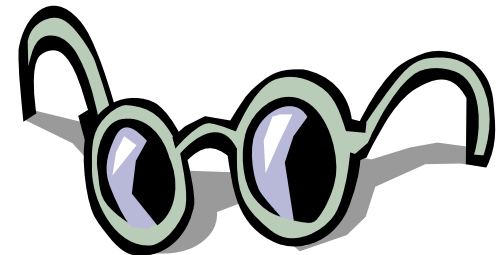
How Do These Rules Apply In An Internet Setting? – ECOA



CONTINUED



- Turn to arranger of credit and multiple creditor rules discussed earlier.
- Many lenders take the position that there is no disclosure obligation in this setting, as the use of a filter is analogous to a broker using a lender's underwriting guides to see if an applicant might qualify.



How Do These Rules Apply In An Internet Setting? – HMDA



CONTINUED



- HMDA Reports.
 - » Multilender Sites.
 - HMDA generally applies only to those making loans and not to pure mortgage brokers.
 - » Prequalifications and Preapprovals.
 - » The definition of "application" under ECOA and Regulation B (such as the distinction between and "inquiry" and an "application") are generally applicable to the definition under HMDA and Regulation C.



How Do These Rules Apply In An Internet Setting? - HMDA



CONTINUED



- Exception to this general rule. Prequalification requests are not applications for purposes of Regulation C, even if they would otherwise be treated as applications under Regulation B. A "prequalification request" under HMDA is a request by a prospective loan applicant for a preliminary determination as to whether the prospective applicant would likely qualify for credit under an institution's standards, or how much credit the applicant might obtain.
- Need not report such requests for HMDA purposes.



How Do These Rules Apply In An Internet Setting? – GLBA

CONTINUED



- Delivery of Initial Notices
 - » Actual notice must be given in writing, or electronically if the consumer consents.
 - » Actual notice includes:
 - Personal delivery;
 - Mail delivery to the consumer's last known address; or
 - Conspicuous posting on an electronic site, provided the consumer acknowledges receipt before obtaining the financial product or service.
 - » The customer must be able to retain or later obtain the notice in the form that she initially received it. (Notice to all consumers is not required.)



How Do These Rules Apply In An Internet Setting? – GLBA

CONTINUED



- Internet Delivery of Notices
 - » An institution can deliver notices electronically to consumers who conduct transactions electronically.
 - » Initial notice can be delivered by
 - Clearly and conspicuously posting the notice on a web site, and
 - Requiring the consumer to acknowledge receipt of the notice before permitting the consumer to obtain the financial product or service requested.
 - » Annual notice can be delivered by clear, conspicuous and continuous posting without acknowledgment.



How Do These Rules Apply In An Internet Setting? – GLBA



CONTINUED



- To be “clear and conspicuous” a posting must:
 - » Be designed to call attention to the significance of the information;
 - » Use text and visual cues to encourage scrolling down the page if necessary; and
 - » Ensure that other elements on the web site do not distract attention from the notice.
- The posting must also be placed on or linked to from a screen the consumer frequently accesses, e.g., the screen from which the consumer conducts the transactions.



Thank You.

Jonathan D. Jaffe, Esquire
Kirkpatrick & Lockhart Nicholson Graham LLP
Four Embarcadero Center, Tenth Floor
San Francisco, CA 94111
Phone: 415.249.1023
Facsimile: 415.249.1001
Email: jjaffe@kln.com
Website: www.kln.com